Filed 2/26/19 P. v. Cortes CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL CORTES, Defendant and Appellant.	D073905 (Super. Ct. No. SCD274077)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed in part; reversed in part with directions. Request for judicial notice granted.

Cherise Bacalski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury acquitted Miguel Angel Cortes of possessing phencyclidine (PCP) for sale, but convicted him of the lesser included offense of PCP possession (Health & Saf. Code, § 11377). The trial court denied Cortes's request for placement in Proposition 36 drug treatment on the grounds that he was not amenable to drug treatment and sentenced him to 100 days in jail and three years' probation. Cortes contends the court erred in excluding him from Proposition 36 probation and drug treatment. We agree and remand for resentencing.

FACTUAL BACKGROUND

A. *The Conviction*

In a high crime area known for gang activity and narcotics, Cortes aroused a police officer's suspicion when he ducked behind a parked truck. Believing that Cortes was hiding or discarding contraband, police contacted him. Cortes appeared to be under the influence of PCP. About two feet away from where Cortes hid behind the truck, police recovered a vial containing PCP, an eyedropper, a latex glove, and six small empty vials with screw-on lids. Police were unable to recover fingerprints from the vials. In a recorded call from jail that was played for the jury, Cortes told an acquaintance that "they got me slippin'"—jargon meaning he got caught after letting his guard down.

The district attorney charged Cortes with possessing PCP for sale; however, the jury acquitted him of that charge and instead convicted Cortes of the lesser included offense of possessing PCP.

B. *Sentencing*

Before sentencing, the People submitted a memorandum stating that Cortes had "ten prior drug related convictions dating back to 1992," all of which involve PCP. However, only two of those convictions were post-Proposition 36—one in 2002 and another in 2015.[1] In a 2002 case, Cortes was assigned to a drug treatment program; however, after committing probation violations, the court determined he was unamenable to further treatment and sentenced him to prison.[2] In 2015 Cortes was charged with nonviolent drug possession offenses in two separate cases, received Proposition 36 drug treatment, and—after he successfully completed treatment—the court dismissed both cases.[3]

At sentencing, the court stated that Cortes "had to serve some time in custody" because he had "just too many violations of the law" that were "too recent." The court acknowledged that Cortes had recently attended Narcotics Anonymous meetings.

---

1 The Attorney General concedes that although Cortes was arrested twice in 2015, he has only one conviction in 2015.

2 These facts are derived from a sentencing memorandum the People filed in the superior court that does not include any documentary evidence of the charges or dispositions. Because Cortes did not contest these assertions either in the trial court or on appeal, we treat them as undisputed facts.

3 We grant Cortes's unopposed request for judicial notice of (1) a January 9, 2017 minute order in *People v. Cortes* (Super. Ct. San Diego County, 2017, No. C351528) granting his petition under Penal Code section 1210.1, subdivision (e)(1) and dismissing that case; and (2) an April 16, 2018 minute order in *People v. Cortes* (Super. Ct. San Diego County, 2018, No. M183280) indicating that case was previously dismissed. (Evid. Code, §§ 452, subd. (d), 453, 459, subd. (a).)

However, the court concluded, "[Y]ou've done something a lot of time before, and it's never worked out."

Defense counsel informed the court that Cortes offered to plead guilty to a misdemeanor with drug treatment, and thus "has been seeking drug treatment in this case." Counsel reminded the court that Cortes completed outpatient treatment in November 2016 that resulted in his 2015 cases being satisfactorily completed under Proposition 36. Cortes's lawyer stated, "The jury found it was not for sales purposes. The fact he has completed . . . outpatient treatment in the past shows that he is amenable to treatment . . . ." Counsel further requested the court sentence Cortes under Proposition 36 to a residential treatment program, stating:

> "[I]n order for [Cortes] not to be Prop[osition] 36 eligible, the Court would need to find he's unamenable to any and all forms of drug treatment. And [Cortes] has not been treated in residential treatment before. So we would ask that he be given an opportunity to complete residential treatment, because our position is, he is amenable. He's completed it in the past; he's demonstrated that he is willing to get treatment in terms of his [narcotics anonymous] meetings.
>
> "And here, we're asking the Court to refer him to Prop[osition] 36, and refer him to an inpatient program, so he can get the treatment he needs. *The only prior time he was assigned to Prop*[*osition*] *36 was 2002, which was 16 years ago*. So I think it's— while he does have a number of convictions related to PCP, they are misdemeanors. And his most recent conduct shows that he did comply and can comply with drug treatment." (Italics added.)

However, the court indicated that Cortes was not eligible for Proposition 36 probation because it "just hasn't worked out" and "[t]here are just too many times, he's been [*sic*] too many failures." Although defense counsel reiterated that Cortes "did

complete an outpatient treatment program in 2016" which "shows he is amenable to treatment," the court ruled that Cortes was not amenable to further drug treatment because "[t]here have been too many failures", "everything's been tried,", and "even though you complete a program, if you then reoffend, it indicates you haven't really completed a program that's been lasting." The court sentenced Cortes to 100 days in jail and three years of probation on various terms and conditions.

DISCUSSION

I. *THE COURT'S FINDING THAT CORTES IS UNAMENABLE TO ANY AND ALL AVAILABLE FORMS OF DRUG TREATMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE*

A. *Mootness*

Cortes has presumably already served his 100-day jail term, but argues that his challenge to the denial of Proposition 36 treatment is not moot. The People do not contest this argument, and we agree the issue is not moot. (*People v. Barros* (2012) 209 Cal.App.4th 1581, 1588, fn. 10 [although defendant already served his jail term, his challenge to the denial of Proposition 36 treatment was not moot because Proposition 36 mandates treatment, successful probationers can obtain dismissal of the charges, and Proposition 36 provides for a far more lenient approach to violations of probation where the violations are related to nonviolent drug offenses].)

B. *Proposition 36, in General*

Penal Code[4] sections 1210 and 1210.1 were adopted by voter approval of Proposition 36 in the November 2000 General Election. (*People v. Legault* (2002) 95 Cal.App.4th 178, 180.) Proposition 36 generally prohibits the incarceration of persons convicted of a nonviolent drug possession offense and mandates that they instead initially receive substance abuse treatment. (§ 1210.1.) A nonviolent drug possession offense is defined as "the unlawful personal use, possession for personal use, or transportation for personal use" of certain controlled substances. (§1210, subd. (a).) A nonviolent drug possession offense does not include the possession for sale, production, or manufacturing of any controlled substance.[5] (*Ibid*.)

"'In enacting Proposition 36, the California electorate declared its purpose and intent: '(a) To divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses; [¶] (b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration—and reincarceration—of nonviolent drug users who would be better served by community-based treatment; and [¶] (c) To enhance public safety by reducing drug-related crime and preserving jails and

---

4 Undesignated statutory references are to the Penal Code.

5 The Attorney General states "there is no dispute that this is a 'nonviolent drug possession' case." In light of this concession, we do not address whether Cortes's conviction of possessing PCP, as a lesser included offense of possessing PCP for sale, is a nonviolent drug possession offense under section 1210, subdivision (a). (See *People v. Glasper* (2003) 113 Cal.App.4th 1104.)

prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.'" (*People v. Harbison* (2014) 230 Cal.App.4th 975, 981 (*Harbison*).)

Certain defendants, however, are ineligible for Proposition 36 probation. For example, section 1210.1, subdivision (b)(5) [hereafter section 1210.1(b)(5)] excludes a person who has [1] "two separate convictions for nonviolent drug possession offenses, [2] has participated in two separate courses of drug treatment [under Proposition 36], and [3] is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment, as defined in [section 1210, subdivision (b)]."

C. *The Standard of Review*

A decision about a defendant's amenability under section 1210.1(b)(5) is made in an exercise of the court's discretion and will be upheld if based on appropriate criteria supported by substantial evidence. (See *People v. Budwiser* (2006) 140 Cal.App.4th 105, 110.)

D. *Ineligibility Under Section 1210.1*(*b*)(*5*)

To find that a defendant is ineligible under section 1210.1(b)(5), the court must first determine that the defendant has "two separate convictions for nonviolent drug possession offenses." However, tallying the number of such convictions is not always just a matter of simple addition. This is because section 1210.1, subdivision (e)(1) provides for a dismissal of drug charges and a limited form of expungement where a defendant successfully completes the drug treatment program and other probation terms:

> "At any time after completion of drug treatment and the terms of probation, the court shall conduct a hearing, and if the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, including refraining from the use of drugs after the completion of treatment, *the conviction on which the probation was based shall be set aside* and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), *both the arrest and the conviction shall be deemed never to have occurred*. The defendant may additionally petition the court for a dismissal of charges at any time after completion of the prescribed course of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted."[6] (§ 1210.1, subd. (e)(1), italics added.)

In January 2017 the trial court granted Cortes's petition under section 1210.1, subdivision (e)(1), finding that he had completed his drug treatment program stemming from his 2015 offenses. The court dismissed his 2015 cases. As a result, Cortes's 2015 conviction thereafter "shall be deemed never to have occurred." (§ 1210.1, subd. (e)(1).) Moreover, except in limited circumstances not relevant here, "the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted." (*Ibid*.) This means that Cortes's 2015 conviction

---

6 Other provisions in section 1210.1, subdivision (e)(1) state that the defendant may still not possess any concealable firearm, and the conviction must be disclosed to law enforcement. The fact of conviction also must be disclosed on applications for public office and law enforcement employment, and as required for licensing by any state or local agency, and for the purpose of jury duty.

cannot constitute any of the "two separate convictions for nonviolent drug possession offenses" under section 1210.1(b)(5).[7]

Cortes contends that after excluding his 2015 conviction, he has only *one prior* conviction for a nonviolent drug possession offense (occurring in 2002).[8] Accordingly, Cortes asserts that the trial court should not have even reached the issue of whether he was unamenable to drug treatment because he does not have the requisite two separate convictions.

We disagree. Section 1210.1(b)(5) requires "two separate convictions for nonviolent drug possession offenses." Even after excluding his 2015 expunged conviction, Cortes has two separate convictions for nonviolent drug possession offenses: one in 2002 and the instant case.

To construe section 1210.1(b)(5) in the manner Cortes urges would require us to insert the word "prior" before "convictions" in section 1210.1(b)(5), so that the statute

---

7 Apart from arguing that there is nothing in the record showing that Cortes completed his 2015 drug treatment, the Attorney General does not contest this issue. However, in the sentencing memorandum, the People conceded that Cortes completed treatment and both 2015 cases were dismissed. Moreover, on Cortes's unopposed motion, we have taken judicial notice of superior court records evidencing these facts. (See fn. 2, *ante*.)

8 Cortes's argument assumes that convictions occurring prior to July 1, 2001 (the effective date of Proposition 36) may not be used to disqualify a defendant from treatment. The Attorney General does not contest this assumption and, therefore, we do not address this point. (See generally Couzens et al., Sentencing California Crimes (The Rutter Group 2018) § 9:7, p. 9-16 ["Convictions and treatment occurring prior to July 1, 2001, probably may not be used to disqualify a defendant from treatment" because the treatment programs contemplated by Proposition 36 did not exist before the legislation's effective date and Proposition 36 provides that its terms are to be applied prospectively.].)

would begin by stating, "Any defendant who has two separate [prior] convictions for nonviolent drug possession offenses . . . ." However, "'In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction.' [Citation.] Where a law is adopted by the voters, 'their intent governs.' [Citation.] In determining that intent, 'we turn first to the language of the statute, giving the words their ordinary meaning.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 879-880.) Significantly, *other* provisions in section 1210.1 involving eligibility expressly refer to *previous* convictions. For example, section 1210.1, subdivision (b)(1) provides that Proposition 36 does not apply to any defendant "who previously has been convicted of one or more violent or serious felonies . . . ." Likewise, subdivision (c)(1) of the statute refers to any defendant "who has been previously convicted" of at least three non-drug-related felonies. Subdivision (c)(2) similarly contains the phrase "defendant who has previously been convicted . . . ."

Thus, the drafters of Proposition 36 knew of the distinction between convictions and prior convictions and how to use language in an enactment to differentiate between the two. In construing section 1210.1(b)(5), we cannot insert the word "prior" where it has been purposefully omitted. (See *Walt Disney Parks & Resorts U.S., Inc. v. Superior Court* (2018) 21 Cal.App.5th 872, 879 ["[w]here, as here, the Legislature has chosen to include a phrase in one provision of the statutory scheme, but to omit it in another provision, we presume that the Legislature did not intend the language omitted from the first to be read into the second"]; *People v. Roach* (2016) 247 Cal.App.4th 178, 183

["[o]ur job is to ascertain and declare what is in terms or in substance contained in the provision, not to insert what has been omitted"].)

Cortes also has "participated in two separate courses of drug treatment" under Proposition 36—one in 2002 and one in 2015. Although under section 1210.1, subdivision (e)(1) Cortes's 2015 *conviction* is "deemed never to have occurred," nothing in section 1210.1 requires the court to ignore the fact that a defendant participated in a course of drug treatment. As the Attorney General correctly notes, the very reason Cortes's 2015 conviction is deemed never to have occurred is that the 2015 drug treatment did occur. (Cf. *People v. Zeigler* (2012) 211 Cal.App.4th 638, 661-662 [expungement provision does not bar consideration of underlying conduct].)

Accordingly, because Cortes has two convictions for nonviolent drug possession offenses and has participated in two separate courses of Proposition 36 drug treatment programs, we turn to the third element of ineligibility under section 1210.1(b)(5)—whether by clear and convincing evidence Cortes is unamenable to "any and all forms of available drug treatment."

E. *Amenability Analysis*

At the outset, the parties disagree about the appropriate definition of "amenable" as it appears in section 1210.1(b)(5). Citing an Internet dictionary, Cortes contends "amenable" means "'ready or willing to answer, act, agree, or yield'" and "'capable of or agreeable to being tested, tried, analyzed.'" He asserts that "[t]he term *amenable* is process-interested, not outcome interested." Using this definition, Cortes contends the

court erred in finding him to be unamenable to drug treatment because he was willing and even requested a drug treatment program.

The Attorney General disagrees, and states that in this context, "'amenable' must mean something other than 'willing.'" Citing a different dictionary, the Attorney General contends "'unamenable to' drug treatment should be construed as 'unsusceptible to' drug treatment. The Attorney General argues that Cortes is unsusceptible to drug treatment because he has repeatedly failed such programs.

We find neither of the parties' suggested definitions to be appropriate for a defendant, such as Cortes, who has already participated in two separate Proposition 36 drug treatment programs and has either failed or relapsed after successfully completing them. Accordingly, in determining whether such a defendant is "amenable" to additional drug treatment, the focus should be whether it is reasonably likely that the defendant will *materially benefit* from further drug treatment—not whether he or she is simply "willing" to try again (as Cortes asserts), or is "susceptible" to drug treatment, as the Attorney General argues.

This result-oriented definition of materiality finds support in Proposition 36 itself. Although section 1210.1 uses the term "amenable" or a form of that word in several different contexts, the only place where the statute defines "unamenable to drug treatment" is in section 1210.1, subdivision (f)(3)(B). Under that subdivision, after the second violation of a drug-related condition of probation, the court must revoke probation if it determines that the defendant is either a danger to others or is unamenable to drug treatment. In determining whether the defendant is unamenable to drug treatment, "the

court may consider, to the extent relevant, whether the defendant (i) has committed a serious violation of rules at the drug treatment program, (ii) has repeatedly committed violations of program rules *that inhibit the defendant's ability to function in the program*, or (iii) has continually refused to participate in the program or asked to be removed from the program." (§ 1210, subd. (f)(3)(B), italics added.)

The definition of "amenable" in section 1210.1, subdivision (f)(3)(B) thus includes not only a consideration of a defendant's willingness to participate in drug treatment, but also his or her ability to "function in the program"—in other words, whether the defendant will likely benefit.

In determining whether a defendant will likely benefit from further drug treatment under Proposition 36, the court can properly consider a variety of factors, including but not limited to past performance, current drug treatment performance, a defendant's willingness to participate, and the opinion of professionals.

The court's error here is that it focused almost entirely on the number of Cortes's prior convictions—not his amenability to treatment. The court began the sentencing hearing by stating Cortes "had to serve some time in custody" because he has "too many violations of the law" that were "too recent." During the hearing, the court repeated that "[t]here are just too many times . . . ." But there was no evidence that Cortes received any drug treatment for his convictions predating Proposition 36. Significantly, apart from the instant case, Cortes had only two post-Proposition 36 convictions—one in 2002 and the other in 2015.

The trial court also found Cortes to be unamenable because he had drug treatment "a lot of times before" and "it's never worked out" and "it just hasn't worked out." The court repeatedly stated that there have been "too many failures." But there was only one post-Proposition 36 failure, and that was 16 years ago. More relevant, in 2017 the superior court determined that Cortes successfully completed a drug treatment program. To make that finding, the court had to determine not only that Cortes completed the prescribed course of drug treatment as ordered by the court, but also that there was "reasonable cause to believe" that he would not abuse controlled substances in the future. (§ 1210, subd. (c).)

Although it is true that Cortes's instant offense shows he relapsed, Proposition 36 anticipates that drug abusers often initially falter in their recovery, but become successful in future attempts, which is why it gives offenders several chances before deeming them ineligible for the benefits of its programs. (*People v. Juhasz* (2013) 220 Cal.App.4th 133, 138 (*Juhasz*).) Proposition 36 is replete with second and third chances for those who qualify for treatment because the voters recognized that recovering from drug addiction is a difficult goal and one which very few will accomplish without a single relapse. (See *In re Taylor* (2003) 105 Cal.App.4th 1394, 1397.) Defense counsel explained this, stating, "We know that with addiction comes relapses, and I think that's what [Cortes] has experienced in this case. He did complete an outpatient program in 2016 which resulted in that other case being terminated. So the fact that he's completed outpatient in the past shows he is amenable to treatment. And again, the Court would have to find that he is

unamenable to any form of available drug treatment. I don't think the prosecution has done that in this case."

The court also stated that Cortes was unamenable to drug treatment because "everything's been tried . . . ." But "everything" had not been tried. Defense counsel informed the court that Cortes "has not been treated in residential treatment before" and asked "that he be given an opportunity to complete residential treatment, because . . . he is amenable. He's completed [outpatient] in the past; he's demonstrated that he is willing to get treatment in terms of his [Narcotics Anonymous] meetings. [¶] And here, we're asking the court to refer him to Prop 36, and refer him to an inpatient program, so he can get the treatment he needs." Nothing in the record indicates that residential treatment was not available.

Juhasz, *supra*, 220 Cal.App.4th 133 is instructive. There, the defendant had failed at two prior attempts at Proposition 36 treatment. (*Juhasz*, at p. 136.) Based on those failures, the trial court found him unamenable under section 1210.1(b)(5), stating that the defendant "'has had many opportunities and squandered them all.'" (*Juhasz*, at p. 137.)

The appellate court in *Juhasz*, *supra*, 220 Cal.App.4th 133 reversed. First, the Court of Appeal noted that section 1210, subdivision (b) defines "drug treatment" as "'a state licensed or certified community drug treatment program, which may include one or more of the following: drug education, outpatient services, narcotic replacement therapy, residential treatment, detoxification services, and aftercare services.'" (*Juhasz*, at p. 139.) After noting that section 1210.1(b)(5) requires a showing of unamenability by *clear and convincing* evidence, the court stated that means "'evidence which is so clear as to leave

no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind.'" (*Juhasz*, at p. 139.) The court reversed the finding of unamenability because "[w]hile it is true that defendant's record supported the conclusion that he had 'squandered' opportunities for treatment in the past cases, and that fact was not without significance, the [trial] court gave no consideration in the present case to what treatment might now be available to defendant within the meaning of section 1210, subdivision (b)." (*Ibid*.) The appellate court found it significant that (1) the defendant had requested inpatient or residential treatment because he believed that was what he needed; and (2) the trial court did not pursue the matter further, noting simply that the defendant was ineligible, "as if to suggest that no matter the prospects for success in the future, his prior missteps foreclosed consideration of further treatment attempts." (*Ibid*.)

Like the defendant in *Juhasz*, *supra*, 220 Cal.App.4th 133, here too Cortes specifically requested residential treatment because he believed that is what he needed. If two failed attempts at treatment under Proposition 36 were insufficient to show unamenability in *Juhasz*, then Cortes's one failure 16 years ago and his successful completion of treatment in 2015 cannot be a sufficient basis for finding him to be unamenable. The evidence is insufficient to support a finding by clear and convincing evidence that Cortes was disqualified from Proposition 36 treatment under section 1210.1(b)(5).[9]

---

9 Because of this disposition, it is unnecessary to address Cortes's alternative argument that his 100-day jail sentence is unauthorized under section 1210.1(b)(5), which provides that where a defendant is ineligible for drug treatment under that subdivision,

DISPOSITION

The superior court's finding that Cortes was unamenable for Proposition 36 treatment is vacated and his sentence is reversed. The matter is remanded to the superior court for further proceedings on Cortes's eligibility for Proposition 36 drug treatment.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

GUERRERO, J.

"the trial court shall sentence that defendant to 30 days in jail." (See *Harbison*, *supra*, 230 Cal.App.4th at p. 978 ["persons who are convicted of simple possession of controlled substances and found to be unamenable to treatment must be sentenced to 30 days in jail—no more, no less, and nothing else"].)